

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of

Amendment of Section 73.606(b),
Table of Allotments,
TV Broadcast Stations
(Mililani Town, Hawaii)

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MM Docket No. 96-136
RM-8816

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Mail Stop 1800D5

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FEDERAL COMMUNICATIONS COMMISSION
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REPLY COMMENTS OF
IRWIN, CAMPBELL & TANNENWALD, P.C.

1. Irwin, Campbell & Tannenwald, P.C. ("IC&T"), filed initial comments in this proceeding on August 12, 1996, on behalf of one of its clients, urging that the proposed allotment of Channel 60 to Mililani Town not be made, because it would not be possible for a prospective applicant to file its application prior to the date when the Commission will suspend acceptance of any further applications for new stations on vacant NTSC channel allotments under the *Sixth Further Notice Of Proposed Rule Making* in MM Docket No. 87-268, FCC 96-317 ("*Sixth Further Notice*"). The *Sixth Further Notice* was released on August 14, 1996, two days after IC&T's initial comments were filed. In that document, the Commission disclosed for the first time that it plans to make an exception to its prohibition on acceptance of applications for new NTSC stations in cases where NTSC allotments are first made after the "freeze" goes into effect. Thus it appears that if the Commission adheres to that plan, the obstacle noted by IC&T to filing an application for construction permit will not exist.

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2. The proposed allotment should nevertheless not be made, because it has not been established that any new station at Mililani Town can survive the transition to digital television. In the *Sixth Further Notice*, the Commission has proposed to reallocate at least television Channels 60-69, if not Channels 2-6 and 52-59 as well, for such uses as may be determined by entities purchasing that spectrum by competitive bidding, and possibly in part for public safety use. Further, the proposed table of digital allotments in the *Sixth Further Notice* does not provide a second channel for a digital transition for any new NTSC station, including a prospective station on the proposed allotment at Mililani Town. The end result is that a station on Channel 60 will be required to abandon its channel in a few years, because Channel 60 will be reallocated for other uses, with no provision for anywhere for the station to go.

3. Moreover, the Commission hopes to reallocate Channels 60-69 in the short-term future, even if it takes longer before Channels 2-6 and 52-59 can be made available for other uses.^{1/} Although existing broadcasters on Channels 60-69 would be protected until they can relocate to lower channels, the effect of allotting Channel 60 to Mililani Town now will be to create a new protected piece of spectrum that probably will not be usable in the short-term future because of the time taken by licensing and construction procedures, thus leaving the spectrum fallow and denying its use to others who might use it more efficiently and/or quickly under the Commission's plan for short-term action.

4. Even if the Commission is not concerned about taking spectrum out of its early reallocation plan, the allotment of Channel 60 is still likely to be futile. By the time NTSC applications are entertained, any mutual exclusivity is resolved (which could take a very long

^{1/} *Sixth Further Notice* at par. 25.

time in light of the suspension of comparative proceedings that is now in effect), a construction permit is awarded, and a station is actually built -- a process that overall usually takes several years -- it will be time for NTSC operations to wind down and for Channel 60 to be given back to the Commission. Thus the public may never receive either NTSC or digital service at Mililani Town.

5. In light of these circumstances, making an allotment on Channel 60 will be a futile act. The allotment should not be made at all unless the proponent can establish that a substitute channel will be available for its use for digital operations in the future. Indeed, prudence dictates that the allotment be made now only if a channel can be found in the "Core" Channel 7-51 range which the Commission has proposed in the *Sixth Further Notice* as the future home of broadcast television; for only that way can there be any assurance that a new television service will ever be provided to the public.

Respectfully submitted,



Peter Tannenwald



Michelle A. McClure

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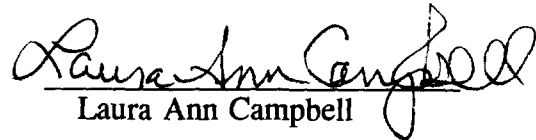
August 27, 1996

CERTIFICATE OF SERVICE

I, Laura Ann Campbell, do hereby certify that I have, this 27th day of August, 1996, caused to be sent by first class United States mail, postage prepaid, copies of the foregoing "Reply Comments of Irwin, Campbell & Tannenwald, P.C." to the following:

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Laura Ann Campbell